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In the Supreme Court of the United States

OCTOBER TERM, 1976

STENCEL AERO ENGINEERING CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-23a) is reported at 536 F. 2d 765. The order of the district court (Pet. App. 24a-27a) is reported at 395 F. Supp. 52.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1976. The petition for a writ of certiorari was filed on September 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the United States is liable under the Federal Tort Claims Act for third-party claims seeking indemnity for damages paid to servicemen injured or killed in activity incident to military service.

STATUTES INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

STATEMENT

This case arose out of injuries sustained by an Air Force Reserve pilot in the performance of duties incident to military service. According to the complaint, Captain John Donham sustained permanent injuries while assigned for training to the 131st Tactical Fighter Group, Missouri National Guard, when he was forced to use his egress life-support system to eject from an F-100D fighter aircraft.

On October 11, 1974, Captain Donham filed a complaint in the United States District Court for the Eastern District of Missouri against petitioner, the United States, and others for injuries generated by "negligence and carelessness" resulting in the alleged malfunctioning of the aircraft egress life-support system. Captain Donham alleged in this complaint that the accident arose out of his military service duties. Subsequently, petitioner filed a cross-claim for indemnity against the United States alleging that the egress system was manufactured according to government specifications and was at all times after the manufacture in the custody or control of the United States.

The United States moved for summary judgment against Captain Donham's claim and also moved to dismiss petitioner's cross-claim, on the ground that recovery against the United States on either claim was precluded by *Feres* v. *United States*, 340 U.S. 135. The district court granted both motions (Pet. App. 24a-27a), and the court of appeals affirmed (Pet. App. 4a-23a).

ARGUMENT

1. Petitioner contends that it may seek indemnity against the United States for any damages for which it may be liable on account of the injuries to Captain

Donham, even though, under *Feres* v. *United States*, 340 U.S. 135, the United States is not directly liable to the serviceman. The court of appeals correctly rejected this contention. The court's judgment affirming the dismissal of petitioner's third-party complaint is supported by two alternative rationales: (a) that the Federal Tort Claims Act does not permit suits for indemnity by third parties who are liable to servicemen for injuries occurring while on active duty; and (b) that common law principles preclude indemnity under a tort theory in situations where, as here, the indemnitor is not directly liable to the injured party. See also the government's brief in opposition in *General Dynamics Corp.* v. *United States*, No. 76-220.[1]

a. Petitioner rests its claim against the United States upon the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2674. But in *Feres* v. *United States*, 340 U.S. 135, the Court determined that the Act, which provides that "[t]he United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *," does not permit suits against the United States alleging liability in tort for the injury or death of a serviceman engaged in his duty. The Court pointed out that whereas the Act provides that "the law of the place where the act or omission * * * occurred" shall govern the United States' liability under the Act, the "relationship between the Government and members of its armed forces is 'distinctively federal in character' * * * " (340 U.S. at 143). The Court therefore concluded that the Act did not create a "new cause of action dependent on local law for service-

[1]A copy of the government's brief in opposition in *General Dynamics* is being furnished to petitioner's counsel.

connected injuries or death due to negligence" (340 U.S. at 146).

Though *Feres* involved a claim brought directly against the United States on behalf of a serviceman, the court of appeals correctly concluded that the same analysis is also appropriate in the context of tort indemnity claims. Imposition of liability for such claims, like imposition of direct liability, would subject the relationship between the United States and its military personnel to the idiosyncracies of state tort law, a result that would be incompatible with the Court's conclusion in *Feres* that "the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority" (340 U.S. at, 143-144). Moreover, tort indemnity would involve the military in tort litigation disruptive of discipline and the orderly conduct of military affairs. As the Court explained in *United States* v. *Brown*, 348 U.S. 110, 112:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the [*Feres*] Court to read that Act as excluding claims of that character.[2]

b. Furthermore, common law principles preclude indemnity or contribution under a tort theory because the

[2]The imposition of indirect liability also would upset the balance struck by Congress in the veterans' compensation statutes between public responsibility for injuries to servicemen and the enormous potential liability arising from the dangers of military service. See 38 U.S.C. 301, *et seq.*, 401, *et seq.*, and 601, *et seq.*

United States is not directly liable for the injuries incurred by plaintiffs. See *United Air Lines, Inc.* v. *Wiener*, 335 F. 2d 379, 403 (C.A. 9), certiorari dismissed *sub nom. United Air Lines, Inc.* v. *United States*, 379 U.S. 951 (and cases therein cited); *Maddux* v. *Cox*, 382 F. 2d 119, 124 (C.A. 8); *Newport Air Park, Inc.* v. *United States*, 419 F. 2d 342 (C.A. 1); *Galimi* v. *Jetco, Inc.*, 514 F. 2d 949 (C.A. 2); *Travelers Insurance Co.* v. *United States*, 493 F. 2d 881 (C.A. 3). As the Ninth Circuit explained in *United Air Lines, Inc.* v. *Wiener, supra*, 335 F. 2d at 403: "The courts have consistently held that in the absence of an express or implied contract of indemnity, or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity."[3] Claims against the United States for indemnity based upon the breach of an express or implied agreement are not assertable under the Tort Claims Act. See *Travelers Insurance Co.* v. *United States, supra; Murray* v. *United States*, 405 F. 2d 1361 (C.A. D.C.); cf. 28 U.S.C. 1346(a)(2). And the United States is not directly liable to the injured party here. *Feres* v. *United States, supra.* Accordingly, even if the Federal Tort Claims Act did permit an indemnity

[3]This doctrine prevents the frustration of statutorily restricted liability schemes by limiting the financial exposure of government to the statutory liability to which it has acceded. See *Cooper Stevedoring Co., Inc.* v. *Kopke, Inc.*, 417 U.S. 106, 115; *Slattery* v. *Marra Bros., Inc.*, 186 F. 2d 134, 139 (C.A. 2), certiorari denied, 341 U.S. 915; *Sheridan* v. *DiGiorgio*, 372 F. Supp. 1373 (E.D. N.Y.), affirmed, 505 F. 2d 727 (C.A. 2), certiorari denied, 420 U.S. 990; *Busey* v. *Washington*, 225 F. Supp. 416, 423 (D. D.C.). It also insures that, in a commercial context, subsequent court action will not undermine the allocation of risks explicit or implicit in the contractual undertaking.

claim for service-connected injuries, the substantive common law would preclude recovery by petitioner.[4]

2. Contrary to petitioner's contention (Pet. 9-11), the decision of the court of appeals does not conflict with the decisions in other circuits that have addressed the issue whether the United States is liable under the Act for third-party claims seeking indemnity in the military context. See *General Dynamics Corp.* v. *United States*, 535 F. 2d 489 (C.A. 9), petition for a writ of certiorari pending, No. 76-220; *United Air Lines, Inc.* v. *Wiener, supra; Barr* v. *Brezina Construction Co.*, 464 F. 2d 1141 (C.A. 10), certiorari denied, 409 U.S. 1125; *Certain Underwriters at Lloyd's* v. *United States*, 511 F. 2d 159 (C.A. 5).[5] While these courts have not adopted

[4]Contrary to petitioner's assertion (Pet. 2-3), the pertinent Missouri cases are consistent with the general common law. Under Missouri law, in the absence of a contractual undertaking between the third-party plaintiff and a third-party defendant-employee such as the United States, whose responsibility to its employees is defined by compensation laws, there is no indemnity: the employer "owed no further duty in tort for which it could be liable to either [the injured employee] or * * * third party plaintiffs," *Howard* v. *Wilson Concrete Co.*, 57 F.R.D. 8, 11 (W.D. Mo.). See *McDonnell Aircraft Corp.* v. *Hartman-Hanks-Walsh Painting Co.*, 323 S.W. 2d 788 (Mo. Sup. Ct.); *State ex rel. Laclede Gas Co.* v. *Godfrey*, 468 S.W. 2d 693 (Mo. Ct. App.). See also *Lewis* v. *Amchem Products, Inc.*, 510 S.W. 2d 46 (Mo. Ct. App.).

[5]*Wellington Transportation Co.* v. *United States*, 481 F. 2d 108 (C.A. 6), also discussed by petitioner (Pet. 11-12), is inapposite. The claim in *Wellington* was brought under the Public Vessels Act, which, this Court has stated (*Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 600), "was intended to impose on the United States the same liability * * * as is imposed by the admiralty law on the private shipowner * * *." The indemnity claim there was for attorneys' fees, and the Sixth Circuit held simply that *Feres* would not bar the long-standing right to attorneys' fees "that under federal maritime law * * * are consistently awarded * * * *" (481 F. 2d at 111). The court remanded the case for

harmonious rationales, each has precluded tort indemnity recovery against the United States.

In *United Air Lines, Inc.* v. *Wiener, supra,* which was reaffirmed in *General Dynamics Corp.* v. *United States, supra,* the Ninth Circuit rejected a third-party claim for indemnity arising from servicemen's injuries "for the reason that the government is not liable under the Federal Tort Claims Act for injuries to servicemen where injuries arose out of or are in the course of activity incident to service" (335 F. 2d at 404). In the other cases, *Barr* v. *Brezina Construction Co., supra,* and *Certain Underwriters at Lloyd's* v. *United States, supra,* the court of appeals stated that the *Feres* holding did not itself prohibit third-party indemnity claims against the United States.[6] However, the courts in both cases found that, on the facts before them, the common law or statutory requirements for indemnity could not be met. Thus, no court of appeals has held the United States liable for the kind of indemnity that petitioner seeks here.

3. Petitioner also contends (Pet. 5-8, 9-12) that the decision here is in conflict with cases in other circuits,[7]

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further findings concerning the nature of appellant's fault. Neither the Public Vessels Act nor a long-standing right to indemnity is involved in this case, and, thus, the decision in *Wellington* does not conflict with the decision here.

[6]At the same time, neither court gave explicit consideration to whether the rationales underlying the decision in *Feres* are applicable in a third-party contest (see Pet. App. 15a-18a).

[7]*E.g., Murray* v. *United States,* 405 F. 2d 1361 (C.A. D.C.); *Wallenius Bremen* v. *United States,* 409 F. 2d 994 (C.A. 4), certiorari denied, 398 U.S. 958; *Newport Air Park, Inc.* v. *United States, supra; Galimi* v. *Jetco Inc., supra; Travelers Insurance Co.* v. *United States, supra.*

and in this Court,[8] concerning injuries to non-military government employees. But the holdings in these cases are inapposite to the issue here since they do not implicate the rationales, which are peculiarly applicable in the military context, that the Court found dispositive in *Feres* and that the court of appeals correctly concluded were applicable here. For example, in *Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597, a suit brought under the Public Vessels Act, this Court held that the Federal Employees Compensation Act ("FECA") did not have the effect of eliminating an otherwise existing third-party right of action. Unlike the present case, *Weyerhaeuser* concerned no new tort remedy, but rather "a rule of admiralty law which, for more than 100 years, has governed * * * the correlative rights and duties of two shipowners whose vessels have been involved in a collision in which both were at fault" (372 U.S. at 603). "[T]he single question [in *Weyerhaeuser* was] whether the historic admiralty rule of divided damages in mutual fault collisions has been qualified * * * by the exclusive liability provision of the federal compensation statute" (372 U.S. at 600).[9] The principle established in *Weyerhaeuser* is that the FECA was not intended to affect third-party rights under settled doctrines of admiralty law. That principle has no bearing on this case, in

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[8]*Weyerhaeuser S.S. Co.* v. *United States,* 372 U.S. 597; *Treadwell Construction Co.* v. *United States,* 372 U.S. 772.

[9]*Treadwell Construction Co.* v. *United States, supra,* similarly concerned the question whether the FECA abrogated third-party remedies against the United States that might otherwise have been available to a joint tortfeasor. The Court, without deciding the issue, summarily vacated the court of appeals' judgment in favor of the United States and remanded the case for further consideration in light of the intervening decision in *Weyerhaeuser.* See Pet. App. 17a, n. 9.

which the question is not whether a statute by implication extinguished liability for indemnity that already existed, but, conversely, whether a statute—the Federal Tort Claims Act—creates a liability for indemnity that did not exist before.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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